1. **Sheikh (Migration) [2018] AATA 1056 (27 March 2018)**

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DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Ms Habiba Yusuf Sheikh
VISA APPLICANT:	Mr Majid Yahye Mohamed
CASE NUMBER:	1615597
DIBP REFERENCE(S):	OSF2015/051295
MEMBER:	Kira Raif
DATE:	27 March 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Child (Migrant) (Class AH) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 117 (Orphan Relative) visa: • Public Interest Criterion 4020 for the purposes of cl.117.223 of Schedule 2 to the Regulations.

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- Statement made on 27 March 2018 at 10:16am

CATCHWORDS
Migration – Child (Migrant) (Class AH) visa – Subclass 117 (Orphan Relative) – Death Certificates – Parents deceased – PIC 4020 waived – Compelling circumstances – Immediate family in Australia – Ongoing medical care of family member – Close connection between visa applicant and review applicant

LEGISLATION
Migration Act 1958, ss 5, 65
Migration Regulations 1994 Schedule 2 cl 117.223 Schedule 4 Criteria 4020

CASES
Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Trivedi v MIBP [2014] FCAFC 42
Mudiyanselage v MIAC [2013] FCA 266
Kaur v MIBP [2017] FCAFC 184

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 17 July 2016 to refuse to grant the applicant a Child (Migrant) (Class AH) visa under s.65 of the *Migration Act 1958* (the Act).

5. The visa applicant is a national of Somalia. He applied for the visa on 30 August 2015. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.117.223 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate found that the visa applicant did not meet Public Interest Criterion (PIC) 4020. The sponsor (the review applicant) seeks review of the delegate's decision.

6. The review applicant appeared before the Tribunal on 27 March 2018 to give evidence and present arguments. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

RELEVANT LAW

7. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.117.223 for the grant of the visa. Broadly speaking, this requires that:

    - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and

    - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and

    - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and

    - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

8. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B).

9. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no

requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.

10. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.

11. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

HAS THE APPLICANT GIVEN, OR CAUSED TO BE GIVEN A BOGUS DOCUMENT, OR INFORMATION THAT IS FALSE OR MISLEADING IN MATERIAL PARTICULAR?

12. The review applicant provided to the Tribunal a copy of the primary decision record. It indicates that the visa applicant, who is the review applicant's nephew, claimed in his visa application that he was an orphan relative and that both of his parents were deceased. In support of that claim, the visa applicant provided with his application a Death Confirmation Certificate dated 15 February 2015 relating to his father and a Death Confirmation issued by the Somali Red Cross Society SOS Hospital dated 5 October 2009 relating to his mother.

13. The Immigration staff sought verification of the death records. On 26 December 2015 the Department received advice that two death certificates relating to the applicant's parents were found to be fraudulent and not registered. The delegate wrote to the applicant seeking his comments on the above information. The applicant replied (through the sponsor) stating, essentially, that they believed the documents to be genuine and that the mother's death certificate was collected from the hospital.

14. In oral evidence to the Tribunal the review applicant said that her sister died in hospital and the system in Somalia is very disorganised and because so many people die all the time, nobody normally asks for death records. It was not until she wanted to take the children to Egypt that she requested the death certificates. Because the system is so poor, many of the documents are lost and maybe that is the reason the hospital advised that the certificates were not issued. The review applicant said that they did obtain the certificate from the hospital. The review applicant said that the child's father passed away when her sister was six months pregnant. She was not sure why the two hospitals would state that the documents were not registered. The review applicant said that the visa applicant's parents have passed away and she has brought him up since he was about six months old.

15. The review applicant provided to the Tribunal copies of the death records and other materials establishing the visa applicant's orphan relative status. The Tribunal acknowledges that evidence but the issue before the Tribunal is not whether the visa applicant is an orphan relative but whether he meets PIC 4020. The Tribunal had not sought to verity these documents because, even if they were found to be genuine and even if it is established that the visa applicant's parents have died (which the delegate appears to accept), it would not assist the applicant in relation to the issue at hand. If it is determined that the earlier submitted document was a bogus document, PIC 4020 would be engaged irrespective of the authenticity, or otherwise, of the newly submitted document (*Mudiyanselage v MIAC* [2013] FCA 266).

16. The review applicant's evidence is that the death certificates were properly obtained. However, the information in the Department's decision record indicates that the verification of these documents showed that these were not registered and were fraudulent. Having regard to that information, the Tribunal finds that the death certificates which the visa applicant presented with the application were bogus documents because they purport to have been, but were not, issued in respect of the person or because they are counterfeit or has been altered by a person who does not have authority to do so.

17. The Tribunal finds that the visa applicant has given, or caused to be given, to the Minister or an office, a bogus document within the meaning of s. 5 of the Act. The Tribunal finds that the visa applicant does not meet PIC 4020(1).

HAS A VISA PREVIOUSLY BEEN REFUSED ON THE BASIS OF A FAILURE TO SATISFY PIC 4020(1)?

18. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA). There is no evidence that the visa applicant has been refused a visa on the basis of a failure to satisfy PIC 4020(1).

SHOULD THE REQUIREMENTS OF PIC 4020(1) OR (2) BE WAIVED?

19. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.

20. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.

21. For the following reasons, the Tribunal is satisfied that the requirements should be waived.

22. The review applicant's oral evidence to the Tribunal is that she has brought up the child since he was a few months old, when his parents died and her sister asked her in her will to take care of her son. The Tribunal accepts the visa applicant and the review applicant have a close connection. The review applicant's evidence is that she and her entire family are Australian citizens or permanent residents but they cannot return to Australia because they have nowhere to leave the child and do not want to separate from him. The review applicant spoke about her elderly mother who needs ongoing medical care but cannot leave the child and relocate to Australia. The review applicant said her two adult children live in Australia and have their own families and she wants to be reunited with her children but cannot do that unless the visa applicant gets the visa. The review applicant said their lives are on hold because they cannot abandon the child.

23. The Tribunal accepts that unless the visa applicant is granted the Australian visa, he cannot enter Australia as the review applicant, her partner and mother are unwilling to return to

Australia without the child. The Tribunal accepts that there will be ongoing separation between the review applicant and her family in Australia if they cannot return to Australia. The Tribunal is mindful that the review applicant and her family members are Australian citizens. The Tribunal accepts that there is a close relationship between the visa applicant and the review applicant, who has brought up the child from a young age and has taken on the role of the mother.

24. The Tribunal has formed the view that there are compassionate circumstances affecting the interests of Australian citizens or Australian permanent residents that justify the granting of the visa. Having regard to those circumstances, the Tribunal finds that the requirements of PIC 4020(1) should be waived.

HAS THE APPLICANT SATISFIED THE IDENTITY REQUIREMENTS?

25. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. The visa applicant provided with his application identity documents and there is nothing to suggest that his identity has been at issue. Therefore, the applicant meets PIC 4020(2A).

HAS A VISA PREVIOUSLY BEEN REFUSED ON THE BASIS OF A FAILURE TO SATISFY PIC 4020(2A)?

26. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).

27. There is nothing to indicate that the visa applicant has previously been refused a visa on the basis of not meeting PIC 4020(2A). Therefore PIC 4020(2B) does not apply.

CONCLUSION

28. On the basis of the above, the applicant does satisfy PIC 4020 for the purposes of cl.117.223.

DECISION

29. The Tribunal remits the application for a Child (Migrant) (Class AH) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 117 (Orphan Relative) visa:

    - Public Interest Criterion 4020 for the purposes of cl.117.223 of Schedule 2 to the Regulations.

Kira Raif
Senior Member